Supreme Court, U.S.
FILED
DEC 16 1992
OFFICE OF THE CLERK

NO. 91-7849

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

STEPHEN BUCKLEY,
Petitioner,

v.

J. MICHAEL FITZSIMMONS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[redacted]
AMICUS CURIAE BRIEF IN SUPPORT OF
J. MICHAEL FITZSIMMONS, ET AL., AND
AMICUS CURIAE BRIEF IN SUPPORT OF
J. MICHAEL FITZSIMMONS, ET AL.

Appellate Committee of the California District
Attorneys Association

KEVIN G. DENOCE
Deputy District Attorney

Counsel of record:
MICHAEL D. BRADBURY
District Attorney of
Ventura County, California
Hall of Justice
800 South Victoria Avenue
Ventura, California 93009
(805) 654-2710

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Pages
MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF J. MICHAEL FITZSIMMONS, ET AL.	1
INTEREST OF *AMICUS CURIAE*	2
AMICUS CURIAE BRIEF IN SUPPORT OF J. MICHAEL FITZSIMMONS, ET AL.	3
SUMMARY OF ARGUMENT	3
ARGUMENT	4
CONCLUSION	11

TABLE OF AUTHORITIES

CASES	Pages
Blanchette v. Conn. General Insurance Corps., 419 U.S. 102 (1974)	5
Burns v. Reed, 114 L.Ed.2d 547 (1991)	7
Butz v. Economou, 438 U.S. 478 (1978)	3, 6, 9
Cook v. Houston Post, 616 F.2d 791 (5th Cir. 1980)	9
Forrester v. White, 484 U.S. 219 (1987)	5
Foster v. Pearcy, 387 N.E. 2d 446 (1979), cert. denied 445 U.S. 960	8
Imbler v. Pachtman, 424 U.S. 409 (1976)	4, 7, 8, 10
Mancini v. Lester, 630 F.2d 990 (3d Cir. 1980)	6
United States v. McNeill, 728 F.2d 5 (1st Cir. 1984)	8
Wilkinson v. Ellis, 484 F.Supp. 1072 (E.D. Pa. 1980)	6
Yaselli v. Goff, 12 F.2d. 396 (2nd Cir. 1926), aff'd 275 U.S. 503 (1927)	4

STATUTES	Pages
Cal. Gov. Code sections 6250, 54950	8
Title 42 U.S.C.S. section 1983	4
UNITED STATES SUPREME COURT RULES	
Rule 37.3	1
Rule 37.5	1
MISCELLANEOUS	
ABA Formal Opinion 199	7
Deliminating the Scope of Prosecutorial Immunity from Section 1983 Damage Suits, 52 N.Y.U.L. Rev. 173 (1987)	6
Prosecutorial Immunity: No Place for Absolutes, U. Ill. L. Rev. 977 (1983)	5

NO. 91-7849

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1992

STEPHEN BUCKLEY,
Petitioner

v.

J. MICHAEL FITZSIMMONS, ET AL.,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF
IN SUPPORT OF
J. MICHAEL FITZSIMMONS, ET AL.

Amicus Curiae, the Appellate Committee of the California District Attorneys Association, is filing this brief accompanied by the written consent of all parties to the above-entitled case (see: Rule 37.3, Rules of the Supreme Court of the United States). Additionally, pursuant to Rule 37.5, consent to the filing of a brief of an *amicus curiae* is not necessary when, as here, the brief is presented on behalf of a political subdivision of a state. The present brief is submitted on behalf of the 58 county district attorney offices in California through the California District Attorneys Association.

INTEREST OF *AMICUS CURIAE*

The Appellate Committee of the California District Attorneys Association is a committee created by the District Attorneys of the State of California. It has been established in order to utilize and coordinate the resources of District Attorneys throughout the State, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal cases and prosecutors. Upon review of the instant matter -- which raises the question concerning the scope of prosecutorial immunity -- the Committee has concluded that the outcome of this case shall likely have a substantial impact upon prosecutors and the administration of criminal justice throughout California. It is for this reason that the Committee has filed an *amicus curiae* brief herein.

BRIEF OF *AMICUS CURIAE*

SUMMARY OF ARGUMENT

Consistent with this court's previous decisions regarding prosecutorial immunity, absolute immunity should apply to alleged constitutional violations arising during judicial proceedings that resulted from a prosecutor's conduct in investigating and preparing for a case to be presented before the grand jury and court. Similarly, a prosecutor's conduct in making post-indictment extra-judicial statements to the media which allegedly results in depriving a criminal defendant of a fair trial should be entitled to absolute immunity. The bases for these conclusions are that (1) the above-mentioned conduct was related to adjudicatory proceedings, (2) absent absolute immunity, prosecutors would likely face harassing or retaliatory lawsuits, and (3) judicial safeguards are available as a means of controlling the alleged constitutional violations caused by the prosecutor. See *Butz v. Economou*, 438 U.S. 478, 512 (1978).

The petitioner's reliance upon the rule applicable to the investigatory and administrative functions of a prosecutor is misplaced since the gravamen of this case is whether the prosecutor's conduct should be categorized as quasi-judicial or investigatory/administrative. Petitioner mistakenly focuses upon the act committed by the prosecutor as opposed to the function he is attacking in seeking legal redress. Since the petitioner has focused his claim on injuries arising in the judicial arena, he is attacking the quasi-judicial function of the prosecutor. Had the petitioner focused his claim on constitutional injuries arising outside of the judicial forum which were directly caused by the prosecutor, *amicus curiae* concedes that such a complaint would attack the investigatory or administrative function of the prosecutor and thus not be protected by absolute immunity.

ARGUMENT

Prosecutorial immunity was created by analogizing the prosecutor's discretionary authority to that of a judge and characterizing the prosecutor as a quasi-judicial officer. *Imbler v. Pachtman*, 424 U.S. 409, 422-423 (1976); *Yaselli v. Goff*, 12 F.2d 396, 404 (2nd Cir. 1926), affirmed *per curium*, 275 U.S. 503 (1927).[1] The common law origin of prosecutorial immunity implies that absolute immunity for purposes of 42 U.S.C. section 1983 is limited to quasi-judicial functions that must be protected from retaliatory lawsuits in order to encourage unbiased

---

[1]In 1977 Congress considered amending 42 U.S.C.S. section 1983 to delineate the circumstances where prosecutors would be liable for monetary damages. The proposed subsection (e) to section 1983 provided:

> A prosecuting attorney who prosecutes any citizen of the United States or other person within the jurisdiction thereof, under color of any statute, ordinance, regulation, custom, or usage of any State or territory, or of the District of Columbia, shall be liable for monetary damages to any aggrieved party, on account of his actions or omissions in the course of the prosecution, if, but only if --
> (1) he conducts the prosecution in a manner that violated the criminal defendant's rights to due process of law under the fifth or fourteenth amendment of the Constitution, or would have violated such rights if the defendant had been convicted, or, sentenced, but, was not, or by mesne process therein;
> (2) he knows or reasonably should, know that his conduct would deprive the criminal defendant of due process of law under the circumstances described in subsection (a) of this section; and
> (3) his conduct consists of suppressing, concealing, destroying, altering, or failing to make timely disclosure of evidence or investigative leads to evidence.
> (4) This subsection shall not be construed as affecting in any way either --

decision making. In *Imbler v. Pachtman, supra*, the court focused on the function a prosecutor was performing in determining whether absolute immunity should attach. The petitioner seizes upon the distinction made between the investigatory and quasi-judicial functions of the prosecutor and argues that the conduct at issue in this case falls in the former category. The analysis employed by the petitioner focuses on the actions committed by the prosecutor as opposed to the function he is attacking in seeking legal redress.

The strict functional test employed by the petitioner is inadequate to deal with prosecutorial acts which serve multiple functions. Many

---

(A) the liability of a prosecuting attorney for acts or omissions that are not within the scope of his functions in the course of a criminal prosecution, or
(B) the liability of any other person than a prosecuting attorney, under any provision of law.

S. 35, 95th Cong., 1st Sess. (amend. 1426, Oct. 6, 1977).

In light of criticism the bill received during committee hearings, it was rejected. See discussion of legislative history in Prosecutorial Immunity: No Place for Absolutes, U. Ill. L.Rev. 977, 989-990 (1983). By rejecting the above amendment to section 1983 which would have subjected prosecutors to lawsuits for conducting prosecutions in a manner that violated a defendant's due process rights, the Congress evidenced its intent to allow for absolute immunity concerning some of the claims brought by the petitioner.

Post enactment legislative history is entitled to little if any weight in determining the meaning of an existing statute. *Blanchette v. Conn. General Insurance Corps.*, 419 U.S. 102, 132 (1974). However, the above subsequent legislative history does indicate the legislature's current intent regarding the scope of absolute immunity for prosecutors which is relevant to whether such immunity "is justified by overriding considerations of public policy." *Forrester v. White*, 484 U.S. 219, 224 (1987).

prosecutorial acts encompass quasi-judicial, investigative or administrative functions. See *Mancini v. Lester*, 630 F.2d 990 (3d Cir. 1980); *Wilkinson v. Ellis*, 484 F.Supp. 1072 (E.D. Pa. 1980).[2] Where a prosecutor's conduct serves both a quasi-judicial and investigative function, the function focused upon determines whether the prosecutor is entitled to absolute immunity. For this reason, the test employed by the petitioner which merely focuses upon the act, is inappropriate for determining the appropriate degree of immunity for multifaceted prosecutorial conduct.

It is easy enough to recite the rule that absolute immunity applies to quasi-judicial acts while qualified immunity applies to investigatory or administrative acts. The real gravamen of the immunity test is in determining the category of the challenged conduct. The court's decision in *Butz v. Economou*, 438 U.S. 478 (1978) provides assistance in resolving the "categorization" issue. In *Butz, supra*, the court compared Department of Agriculture officials conducting administrative hearings to prosecutors. *Id.* at 515. The court granted these officials absolute immunity for exercising discretion similar to that exercised by prosecutors. The court identified three factors to be considered in determining whether absolute immunity existed: (1) whether the discretionary conduct was related to adjudicatory proceedings, (2) whether absent absolute immunity the official would likely face harassing or retaliatory lawsuits, and (3) whether judicial safeguards were available

---

[2]The functions of a prosecutor may be divided into seven categories: (1) quasi-judicial, (2) executive or administrative, (3) investigatory, (4) ministerial acts, (5) civil/advisory, (6) public official acts, (7) individual and campaign acts. Note, Deliminating the Scope of Prosecutorial Immunity from Section 1983 Damage Suits, 52 N.Y. U. L. Rev. 173, 187-188 (1977).

as a means of controlling unconstitutional conduct. *Id.* at 512. Notably, the third prong of this test was cited with approval in the court's most recent opinion on prosecutorial immunity. *Burns v. Reed*, 114 L.Ed.2d 547, 562, 565 (1991). Prosecutorial conduct which satisfies the above-mentioned three-part test should be characterized as quasi-judicial and entitled to absolute immunity.

Clearly, the conduct of the prosecutor in this case in preparing for grand jury proceedings satisfies the test set forth above. Such conduct was related to an adjudicatory proceeding. Absent immunity for such conduct, prosecutors would be subjected to retaliatory lawsuits. Finally, judicial safeguards were available to redress the alleged constitutional violation caused by the prosecutor. As noted in respondent's brief, there were many procedural safeguards which Buckley could have employed to ensure his right to a fair trial. Since the harm complained of by the petitioner allegedly occurred within the judicial forum, the third prong of the test announced in *Butz* and approved in *Burns* is satisfied.

In analyzing the prosecutor's post-indictment statement to the media under the above-mentioned test, it is clear that this conduct is also entitled to absolute immunity. The statements to the media were closely related to an adjudicatory proceeding (the grand jury proceeding), absent immunity for such conduct, prosecutors would likely face harassing or retaliatory lawsuits, and judicial safeguards were available as a means of controlling the constitutional violation complained of by the petitioner. Notably, the constitutional violations complained of by the petitioner concerning the post-indictment statements to the media are the right to an impartial jury and a fair trial. Again, by basing his

claim on alleged constitutional violations which occurred in judicial proceedings (and which could have been controlled by the judiciary) the petitioner has focused his grievance on a quasi-judicial function of the prosecutor. Had the petitioner based his claim on some constitutional injury occurring separate and apart from the court proceedings, which was directly caused by the prosecutor, the above-mentioned test would not be satisfied and the prosecutor would only be entitled to qualified immunity.

A prosecutor has a duty to inform the public regarding cases which are pending in his office. *United States v. McNeill*, 728 F.2d 5, 11-12 (1st Cir. 1984); *Foster v. Pearcy*, 387 N.E. 2d 446, 448-449 (1979), cert. denied 445 U.S. 960; ABA Formal Opinion 199 (1940). Some states impose a statutory duty on prosecutors to disclose information to the media regarding the government's business. See Cal. Gov. Code sections 6250, 54950. It would be incongruous to impose a duty on prosecutors to disclose information to the media regarding pending cases while at the same time exposing them to civil suits for such conduct. Access to information regarding the government's business is a right the media and public jealously guard. Abolishing absolute immunity for providing such information to the media and public would unnecessarily chill the dissemination of information by prosecutors and interfere with the public's right to obtain such information.

The above conclusions are consistent with this court's decisions regarding prosecutorial immunity. In *Imbler*, *supra*, the court suggested that all acts associated with the "obtaining, reviewing, and evaluating of evidence" in preparation for "the initiation of criminal process and for a trial" are quasi-judicial. *Id.* at 431, note 33. In *Imbler*, the court

rejected the contention that the prosecutor's conduct was "investigatory" when he requested that the police hold off questioning a witness about a pending charge until after the witness had completed his testimony. *Id.* at 430, note 32. The court construed such conduct as "an effort to control the presentation of his witness' testimony, a task fairly within his function as an advocate." *Ibid.* Similarly, the conduct by the prosecutor in selecting his experts on boot-print evidence relates to a task fairly within his function as an advocate.

The petitioner argues that the prosecution's conduct in allegedly procuring false/unreliable evidence to be used at trial should be deemed investigatory conduct not entitled to absolute immunity. This court rejected such an analysis in *Butz, supra*, when it stated:

> Evidence which is false or unpersuasive should be rejected upon analysis by an impartial trier of fact. If agency attorneys were held personally liable in damages as guarantors of the quality of their evidence, they might hesitate to bring forward some witnesses or documents. "This is particularly so because it is very difficult if not impossible for attorneys to be absolutely certain of the objective truth or falsity of the testimony which they present."

Id. at 517 (citations omitted). See also, *Cook v. Houston Post*, 616 F.2d 791 (5th Cir. 1980) (conduct of state prosecutor in interviewing witnesses before presenting their testimony to the grand jury protected by absolute immunity).

The argument in favor of absolute immunity for the prosecutorial conduct at issue in this case is to protect the diligent and faithful prosecutor from being subjected to unnecessary retaliatory and harassing

lawsuits. It is not for the benefit of the woeful prosecutor who strays from the strict ethical guidelines which implore prosecutors to act as ministers of justice and pursue the truth. With respect to judicial immunity this court has commented that:

> "[t]his immunity . . . 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences'."

Imbler v. Pachtman, supra, 424 U.S. at 418, note 12. (Citation omitted.)

CONCLUSION

In light of the foregoing, *amicus curiae* respectfully submits that the conduct of the prosecutor concerning the issues pending before this court are entitled to absolute immunity. Where an accused complains of alleged constitutional violations attributable to prosecutorial conduct which affected the fairness of judicial proceedings, the prosecutor is entitled to absolute immunity since judicial safeguards are available as a means of controlling the alleged constitutional violations. Accordingly, we urge the court to rule in favor of respondent and uphold the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted on behalf of the
Appellate Committee of the California
District Attorneys Association

KEVIN G. DeNOCE
Deputy District Attorney

Counsel of record:
MICHAEL D. BRADBURY
District Attorney of
Ventura County, California

Attorney for *Amicus Curiae*